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October Term, 1972

No. 72-[redacted]

STOVE, FURNACE & ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 123-B,

Petitioner,

vs.

GAFFERS & SATTLER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1205

STOVE, FURNACE & ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 123-B,

Petitioner,

vs.

GAFFERS & SATTLER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Court of Appeals (Pet. App. A., pp. 1-2)* is reported at 470 F.2d 860 (9th Cir. 1972). The District Court's Order Directing Arbitration (Pet. App. B., pp. 3-4)** is reported at .... F. Supp. ...., 82 L.R.R.M. 2222 (C.D. Cal. 1970). The "Findings of Fact and Conclusions of Law" set forth at pages 5 through 8 of Appendix B to the Petition were not acted upon by the District Court. On December 2, 1970, pursuant to a stipulation of the parties, the District Court

*"Pet. App. A., pp. 1-2" refers to the Appendix A contained in the Petition. Similar designations will be used herein.

**Appendix B to the Petition.

ordered that Petitioner's proposed "Findings of Fact and Conclusions of Law" and Respondent's "Objections to Proposed Findings of Fact and Conclusions of Law" be deleted from the "Designation of Record on Appeal" which had been filed with the District Court.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Is arbitration permissible where the labor organization seeking to compel arbitration is attempting to use it as a vehicle for obtaining contractual rights in a bargaining unit lawfully represented by another labor organization?

2. Is arbitration permissible where the granting of any of the relief sought by the grievance would necessarily compel the employer against whom arbitration is sought to violate Sections 8(a)(2), 8(a)(5), and 9(a) of the Labor Management Relations Act of 1947, as amended?

3. Is arbitration permissible where the labor organization seeking to compel arbitration is attempting to use it as a means of negativing the effect of final, adverse determinations by the National Labor Relations Board of the same issues which it seeks to have arbitrated?

Statutes Involved.

Section 301 of the Labor Management Relations Act of 1947, as amended (hereafter the "Act"), 29 U.S.C. Sec. 151, *et seq.*, is set forth at page 3 of the Petition. Sections 8(a)(2), 8(a)(5), and 9(a) are set forth at Appendix A, *infra*, p. 1.

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Statement.

Petitioner's statement (Pet., p. 4, *et seq.*) requires considerable amplification.

During the negotiations which resulted in the agreement for the term July 1, 1968-June 30, 1971 between Petitioner and Respondent's predecessor (hereafter the "Mission Agreement"), Respondent's predecessor repeatedly advised Petitioner that its plant at Hawthorne, California (hereafter the "Mission Plant") might be closed during the term of the new agreement. Accordingly, the parties included a severance pay clause in the Mission Agreement which provided, *inter alia*, a formula for severance payments to employees terminated in the event of the sale of the Mission Plant or the cessation of its operations.

Several months after the Mission Agreement became effective, Magic Chef, Inc., which had for several years operated a plant at Industry, California (hereafter the "Industry Plant"), purchased the assets of Gaffers & Sattler which then consisted of the Mission Plant and another located in Los Angeles, California (hereafter the "Utility Plant"). After the acquisition, Magic Chef combined the Industry, Mission, and Utility Plants into its Gaffers & Sattler, Inc. subsidiary, the Respondent here.

Respondent assumed all labor contracts in effect at the plants which it had purchased, including the Mission Agreement which was applicable to certain production employees at the Mission Plant, and an

agreement between Respondent's predecessor and Teamsters Local No. 196 (hereafter "Local 196"), which applied to certain truck and forklift drivers and warehousemen at the Mission Plant.

In August, 1969, Local 196 achieved recognition as the bargaining agent for all of the Industry Plant's production, maintenance, warehouse, shipping and truck driver employees (hereafter the "Industry bargaining unit"). The following month Local 196 entered into a collective bargaining agreement (hereafter the Industry Agreement) with Respondent applicable to said employees for a term expiring on September 30, 1972.

On October 2, 1969, Petitioner's parent labor organization filed unfair labor practice charges with the Director of the Board's 21st Regional Office (hereafter the "Director") in Case No. 21-CA-8821, alleging, *inter alia,* that the Industry Agreement was unlawful under Section 8(a)(2) of the Act. Three weeks later the charges were dismissed for lack of merit.

On May 12, 1970, Petitioner submitted the grievance which the District Court subsequently ordered Respondent to arbitrate (Pet. App. B., p. 3). The following day Petitioner made a written demand that Respondent recognize it as the bargaining representative of all employees in the Industry bargaining unit. On May 25, 1970, Respondent rejected the recognition demand on the ground, *inter alia,* that since it was party to a lawful contract with Local 196 covering

the Industry bargaining unit, compliance with said demand would be unlawful. Respondent also rejected Petitioner's grievance as non-arbitrable on the same date.

On June 4, 1970, Petitioner filed new unfair labor practice charges with the Director in Case No. 21-CA-9287, alleging that Respondent's refusal to accede to its May 13th recognition demand violated Sections 8(a)(1) and (5) of the Act. The Director dismissed these charges on June 22, 1970, and on August 5, 1970, the Board's General Counsel denied Petitioner's appeal from the Director's action. Notice of the General Counsel's action was received by the parties on August 10, 1970. On August 19, 1970, less than 10 days after being apprised of the Board's action, but more than four months after the Respondent had denied the arbitrability of its grievance, Petitioner filed its Petition to Compel Arbitration which was granted by the District Court in October, 1970.

On July 24, 1972, Respondent's parent labor organization filed a representation petition with the Director in Case No. 21-RC-12813, seeking an election among the employees in the Industry bargaining unit. On September 7, 1972, the Board affirmed the Director's August 8, 1972 dismissal of the petition on the ground that it was barred by the Industry Agreement. On September 1, 1972, Respondent's parent labor organization again petitioned for an election among the employees in the Industry bargaining unit in Case No. 21-RC-12867. The Director dismissed this petition on the same ground on October 18, 1972.

During oral argument the Court below received copies of both petitions, the Board's Administrative Ruling AD-216 in Case No. 21-RC-12813, and the Director's decision in Case No. 21-RC-12867. Subsequent to the decision below, the Board affirmed the Director's action in Case No. 21-RC-12867 in Administrative Ruling AD-245.

On December 5, 1972, the Court below entered its *per curiam* decision, finding the facts here indistinguishable from those in *International Association of Machinists v. Howmet Corp.*, 466 F.2d 1249 (9th Cir. 1972), and concluding that arbitration should not be compelled as an award granting any relief on the issues before it would foster, rather than alleviate industrial disharmony.

REASONS FOR DENYING THE WRIT.

I.

The Decision Below Is Clearly Correct.

Each federal appeals court which has answered the issues present here has arrived at the same result: arbitration may not be used by one labor organization to secure representation or contractual rights in a bargaining unit lawfully represented by another where an award favoring the grieving union would stimulate industrial strife or compel the commission of unfair labor practices. *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (2d Cir. 1966), *cert. denied*, 384 U.S. 988 (1966); *Printing Specialties Union No. 447 v. Pride Papers-Aaronson Bros. Paper Corp.*, 445 F.2d 361 (2d Cir. 1971), *cert. denied*, 404 U.S. 1001 (1971); *Local 464, Bakery Workers Union v. Hershey Chocolate Corp.*, 433 F.2d 926 (3rd Cir. 1970), *aff'g* 310 F. Supp. 1182 (M.D. Pa. 1970); *Owens-Illinois, Inc. v. District 65, Retail Store Union*, 393 F.2d 932 (2d Cir. 1968), *aff'g* 276 F. Supp. 740 (S.D. N.Y. 1967).

The fact that Petitioner is attempting to use arbitration as a means of overturning adverse Board decisions on the same issues raised by its grievance removes any question as to the propriety of the decision below. *McGuire v. Humble Oil & Refining Co., supra; Local 464, Bakery Workers Union v. Hershey Chocolate Corp., supra.*

Petitioner attempts to avert the rule of these cases by abandoning the grievance about which the parties litigated below—Petitioner's protest against Respondent's refusal to impose the Mission Agreement on the

Industry bargaining unit*—and substituting for it here new demands for preferential hiring of Petitioner's members at the Industry Plant (Pet., p. 10) or monetary damages against Respondent for closing the Mission Plant (Pet., p. 13). Petitioner's stated justification** for this tactic is untenable as it would preclude any rational basis for decision-making in cases where arbitrability is at issue.

Another compelling ground for denying arbitration which the Court below did not find necessary to reach is the fact that the Board has determined finally and adversely the representation dispute which is the subject of the grievance. Since the Board's exclusive authority ultimately to resolve representation issues either through the processing of refusal-to-bargain charges under Section 8(a)(5) of the Act, or representation petitions under Section 9, has been exercised here, an award granting any of the relief sought by the grievance would be meaningless and unenforceable. *Carey v.*

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*The grievance states:

"That Union protests the Company's position that after October 1, 1970, the Agreement between the Company and the Union will not apply to a re-located site of the Plant in the City of Industry. The Union takes the position that the Agreement in its entirety, every Section and clause thereof, applies and will apply to the Company's operations in the City of Industry Plant and that the removal of machinery, equipment and manufacturing processes, employees' supervision and all other accouterments of production, constitutes a plant relocation and not the cessation of operations and, therefore, the contract between the Union and the Company will apply to the City of Industry plant or a portion thereof, which is a re-location of the Mission Facilities Plant." (Pet. App.. B., p. 3)

**". . . the significant issue is not the scope of the *demands made in arbitration* and whether *those demands* conflict with national labor policy, but the scope of the relief which *might* be awarded by an arbitrator and whether *that relief* conflicts with national labor policy." (Pet., pp. 9-10) (Emphasis added).

Westinghouse Electric Corp., 375 U.S. 261 (1964); *McGuire v. Humble Oil & Refining Co., supra; Local 7-210, OCAW v. Union Tank Car Co.*, ... F. 2d ...., 82 L.R.R.M. 2823 (7th Cir. 1973).

Although Petitioner concedes that "a serious legal issue exists with respect to an arbitrator's right to issue an award in derogation of the rights of employees at a plant to which work and equipment are transferred" (Pet., p. 13), it appears to contend that the existence of the Industry Agreement, which barred the processing of the petitions in Cases Nos. 21-RC-12813 and 21-RC-12867, should not materially affect the resolution of that issue. The fallacy of this argument is that Respondent has a statutory obligation exclusively to recognize Local 196 in the Industry bargaining unit, and would violate Sections 8(a)(2), 8(a)(5), and 9(a) of the Act by granting any part of the grievance.

Petitioner's contention that arbitration is necessary to protect the rights of its members with respect to the Mission Plant's closing is equally fallacious. The grievance does not involve Respondent's obligation to ameliorate the impact of the Mission Plant's closing on the Mission Plant's employees, and the Petition makes no showing that a remedy on this subject exists in the provisions of the Mission Agreement. *Local 464, Bakery Workers Union v. Hershey Chocolate Corp., supra.*

Petitioner's remedy, if any, with respect to the impact on its members of the Mission Plant's closing would have been in bargaining with Respondent on that subject as required by Section 8(a)(5) of the Act. See, *e.g., N.L.R.B. v. Royal Plating and Polishing Co. Inc.*, 350 F.2d 191 (3rd Cir. 1965).

II.

There Is No Conflict of Decision.

Contrary to Petitioner's assertions (Pet., p. 6), the decision below is entirely consistent with *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The basis for accommodating the decision below to *Wiley* is clearly spelled out by this Court in *Wiley:*

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. [Citations omitted] *There is no problem of conflict with another union* [Citation omitted] *since Wiley had no contract* with any union covering the unit of employees which received the former Interscience employees." (376 U.S. 551, n.5) (Emphasis added).

In *Howmet, supra,* the Court summarized the teaching of the *Steelworkers Trilogy* as follows:

> ". . . the underlying objective of the policy favoring the resolution of disputes by arbitration is that of avoiding industrial strife and promoting industrial harmony. . . ." (466 F.2d at 1253).

As the Court below found that granting arbitration here would "foster rather than alleviate industrial disharmony" (470 F.2d at 860), its refusal to permit

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arbitration here is entirely consistent with the *Trilogy*. As the Court stated in *Howmet:*

> ". . . when situations arise, as here, in which the objective of avoiding industrial strife and disharmony would not be served by compelling arbitration, a court has the obligation to examine the potential consequences of compelling arbitration and to tailor its order accordingly . . ." (466 F.2d at 1253).

There is no conflict between *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir. 1967), *cert. denied*, 389 U.S. 831 (1967), and either the decision below or *McGuire v. Humble Oil & Refining Co., supra.* The facts here duplicate those in *Howmet*, the holding of which is based on *McGuire* and *Owens-Illinois, Inc. v. District 65, Retail Store Union, supra.* In *Monroe Sander* the Court of Appeals for the Second Circuit found no difficulty in harmonizing its decision with *McGuire:*

> "Citing the presence of a union at the successor, [in *McGuire*] a fact which the Supreme Court noted was not present in *Wiley*, and the unit determination by the Labor Board, we refused to compel Humble to arbitrate. . . . Our rationale was that the conflicting interests . . . would lead to 'unrest and dissatisfaction' and that to order Humble to arbitrate . . . might be tantamount to forcing Humble to bargain with a minority union in violation of the Labor Act." (377 F.2d at 13).

In short, the statutory rights of a lawful incumbent union such as Local 196 in the Industry bargaining unit, outweigh those of a competitor such as Petitioner which is attempting to use arbitration as a

means of gaining recognition rights in the incumbent's bargaining unit. Contrary to Petitioner's suggestion (Pet., pp. 11-12) this principle is well-established, and, as indicated by this Court's refusal to review the Second Circuit's decisions in *McGuire v. Humble Oil & Refining Co., supra,* and *Printing Specialties Union No. 447 v. Pride Papers-Aaronson Bros. Paper Corp., supra,* it requires no further clarification.

Petitioner's suggestion (Pet., p. 11) that the Second Circuit appeared to question the correctness of *McGuire* in *Monroe Sander* is set to rest by its subsequent decision in *Owens-Illinois, Inc. v. District 65, Retail Store Union, supra,* where it affirmed, *per curiam,* the District Court's decision (276 F. Supp. 740 (S.D. N.Y. 1970)), which relied on *McGuire* to deny arbitration in circumstances not distinguishable from those here.

Conclusion.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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TYRE & KAMINS,
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APPENDIX A.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.